

THREE DISPUTES AND THREE OBJECTIVES: CHINA AND THE SOUTH CHINA SEA

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The recent heightening of the competition between China and its neighbors over sovereignty, resources, and security in the South China Sea has drawn the attention of U.S. diplomatic and military leaders who seek to promote stability and security in these globally important waters. As American leaders discuss policies and strategies in support of regional stability, some have described the complex disputes in the South China Sea as essentially a single tangled knot of intractable challenges. In fact there are three severable categories of disputes, each with its own parties, rule sets, and politics. Unfortunately, the region's states are currently pursuing win-lose solutions to these three disputes based on competing claims of exclusive sovereignty and jurisdiction. A careful analysis of the nature of each dispute reveals opportunities for more productive pathways to dispute

resolution based on a return to Asia's history of win-win problem solving based on mutual interests.

Three Disputes

There are three basic categories of disputes in the South China Sea, each with its own parties, rule sets, politics, and security concerns. These disputes have resulted in recurring flashes of tension and conflict for approximately forty years. Notable incidents over sovereignty include the Chinese attack on the forces of the Republic of Vietnam in the Paracel Islands in 1974, China's attack on Vietnamese forces near Fiery Cross Reef in 1988, and China's military ouster of Philippines forces from Mischief Reef in 1995. The result of this series of incidents was the coalescence of a unified ASEAN political position in opposition to China's behavior and, to decrease tensions with its neighbors, to China's acceptance of the 2002 ASEAN Declaration on the Conduct of Parties in the South China Sea, which included the agreement to "resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force..."¹ What followed was more than 15 years of relative regional calm as China pursued a policy of regional integration with its Southeast Asian neighbors with generous economic, commercial, infrastructure, and cultural programs. The United States repeatedly professed neutrality over the outcome of the sovereignty and jurisdictional disagreements as long as all parties continued to pursue peaceful means of dispute resolution.

This stability was shattered by a series of antagonistic Chinese actions. Recent flare-up in tensions in the South China Sea began when China pressured Vietnam and several oil companies over oil exploration and drilling off the Vietnamese coasts. As U.S. Deputy Assistant Secretary of State Scot Marciel testified before the Senate Foreign Relations Committee in July 2009, "Starting in the summer of 2007, China told a number of U.S. and foreign oil and gas firms to stop exploration work with Vietnamese partners in the South China Sea or face unspecified consequences in their business dealings with

¹ <http://www.aseansec.org/13163.htm>.

China.”² The Senate hearing was held in the wake of the March 2009 “Impeccable Incident,” in which an American naval research vessel was aggressively harassed approximately 70 nautical miles off Hainan Island by Chinese ‘fishermen’ with the support of Chinese civilian and military vessels.

These Chinese actions resulted in a return to tensions in the region. In response to China’s new strategy, U.S. Secretary of State Hilary Clinton stated at the ASEAN Regional Forum in July 2010,

The United States supports a collaborative, diplomatic process by all claimants for resolving the various territorial disputes without coercion. We encourage the parties to reach agreement on a full code of conduct. The United States, like every nation, has a national interest in freedom of navigation, open access to Asia’s maritime commons and respect for international law in the South China Sea.”

Until this time, the only common attribute of all South China Sea disputes was that they involved China as a party. However, China’s turn in 2009 toward an assertive, even aggressive approach—especially in its efforts to control American naval activities in the South China Sea—resulted in new American attention to and interest in all three categories of disputes. In order to find a pathway to return to the desired state of regional stability, it is helpful to examine the attributes of each type of dispute.

Sovereignty. Disputes over sovereignty involve the question of which coastal state has the right to exercise sovereignty over the physical territory of the islands in the South China Sea. It involves China, Vietnam, Malaysia, the Philippines, Taiwan and perhaps Brunei.³ In 1992, China established its Law on the Territorial Sea and Contiguous Zone,

² Jason Folkmanis, “China Warns Some Oil Companies on Work with Vietnam, U.S. Says,” *Bloomberg*, July 16, 2009, available at <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=ak.IQfnkDStU>.

³ Joshua P. Rowan, “The U.S.-Japan Security Alliance, ASEAN, and the South China Sea Dispute,” *Asian Security*, Vol. XLV, No. 3, May/June 2005, pp. 414, 419-429.

which specifically claims sovereignty over each of the island groups in the South China Sea—the Pratas Islands (Dongsha), Paracel Islands (Xisha), Macclesfield Bank (Zhongsha), and the Spratly Islands (Nansha). In 1947 the government of the Republic of China began to publish maps with a U-shaped series of lines in the South China Sea to delineate its maritime boundaries.⁴ The Chinese government repeated this cartographic feature after the Communist party came to power on the mainland in 1949 and today remains depicted on maps published in China or Taiwan. However, the nature of China’s claim over the expanse of water and the numerous islands, shoals, rocks and islets contained within the nine dashes of the U-shaped line has never been specified. Among Chinese scholars and officials, there appear to be four dominant schools of thought as to the line’s meaning, but the Chinese government maintains a studied policy of ambiguity about the meaning of the nine-dashed line

Sovereign Waters. Some Chinese policy analysts maintain that the waters within the U-shaped line should be considered sovereign Chinese waters, subject to the full measure of the government’s authority, presumably as either internal waters or territorial seas. One group of senior Chinese defense analysts, for instance, describes Chinese offshore interests as “the area extending out from the Chinese mainland coastline between 200 nautical miles (to the east) and 1600 nautical miles (to the south)” or roughly to the 4 degrees northern latitude claimed in the 1935 report. They consider these “sea domains under Chinese jurisdiction ... [as] the overlaying area of China’s national sovereignty.”⁵

Historic Waters. Some Chinese have suggested that the concept of ‘historic waters’ enables the government to legitimately claim broad control over the South China Sea.⁶ The

⁴ Li Jinming and Li Dexia, “The Dotted Line on the Chinese Map of the South China Sea: A Note,” *Ocean Development and International Law*, Volume 34 (2003), p. 287-95.

⁵ Wang Shumei, Shi Jiazhu, and Xu Mingshun, “Carry Out the Historic Mission of the Army and Establish the Scientific Concepts of Sea Rights,” *Zhongguo Junshi Kexue* (China Military Science), Beijing, February 1, 2007, p. 139-46 (OSC CPP20070702436003).

⁶ “South China Sea: Controversies and Solutions—Interview with Liu Nanlai,” *Beijing Review*, Beijing,

concept is a variation on China's claim of sovereignty in the South China Sea and reflects the perspective held by many Chinese academics and policy-makers that the nine-dashed line represents a claim to historic waters, historic 'title,' or at least some kind of exclusive historic rights to administer the waters and territory within the line's boundaries.⁷ Perhaps the most authoritative statement of international law on the point was issued in 1951 by the International Court of Justice in the *Fisheries Case*, in which the United Kingdom challenged before the International Court of Justice Norway's claim to sovereignty over waters along its craggy coast line beyond the traditional three-mile territorial sea limit at the time.⁸

The Court considered three relevant factors: 1) the close geographical dependence of the territorial sea upon the land domain—the relevant portions of the Norwegian coastline are deeply indented with complex geographic features and an estimated 120,000 minor islands, islets, rocks and shoals; 2) sufficiently close links between the land formations and the sea space to make the region susceptible to a fully-sovereign regime of governance; and 3) unique economic interests belonging to the coastal state based on clear evidence of long usage. Based on its assessment of these factors, the court approved Norway's extension of sovereignty over the sea areas and the features contained within them based on its historic claims.

The requirements laid out in the Fisheries Case for an extension of sovereignty over water space by a coastal state do not lend support to China's claim. In particular, there is no close geographical dependence between the sea and the land in this region. Indeed, the land features are so insignificant that they have long been seen more as navigational hazards than as productive territory. Additionally, the islets themselves are relatively

June 4-10, 2009.

⁷ Hong Nong, National Institute for South China Sea Studies, presentation delivered at the University of Hawaii and the Asia Pacific Center for Strategic Studies, Honolulu, October 1, 2010.

⁸ *Fisheries Case* (United Kingdom v. Norway) Judgment of December 18, 1951, International Court of Justice Reports 1951, p. 116.

widely dispersed in comparison with the features along the Norwegian coastline. As such, the lack of sustainable land available to support an indigenous population and the sporadic presence of fishermen and traders strongly suggests that the region is not susceptible to a fully sovereign regime of governance. Accordingly, China's claim of historic waters has weak support on these bases.

Concerning the question of unique economic interests, China has had well-documented contacts with the islands of the South China Sea for many centuries by fishermen, traders and the occasional government official, but the historical record also reflects that Vietnam has had similar well-documented contacts with the islands and neither country has a record of sustained, exclusive use and reliance upon the resources of the South China Sea. The people of the Philippines, Malaysia and Indonesia also maintained contacts with these islands in support of traditional fishing activities and in support of local trade. Thus, there is no evidence supporting any unique economic interests of China, or any single country, in and around the islands of the South China Sea. Rather the evidence suggests the contrary—that the waters of the South China Sea and the sparse islands, islets, rocks, and reefs among them have for many centuries been the common fishing grounds and trading routes of all regional peoples. Indeed, this long-standing common usage suggests that rather than having been supervised as a zone of sovereignty, the South China Sea developed as a sort of commonly held regional zone in which all parties pursued their interests without fear of molestation by the authorities of other coastal states.

Island Claims. Some Chinese academics and policy-makers view the U-shaped line as asserting a claim of sovereignty over all the islands, rocks, sand bars, coral heads and other land features that pierce the waters of the South China Sea, and to whatever jurisdiction international law of the sea allows coastal states to claim based on sovereignty over these small bits of land.⁹ On their face at least, China's claim to sovereignty over the

⁹ Hong Nong, National Institute for South China Sea Studies, presentation delivered at the University of

islands and jurisdiction that is lawfully derived from it are legitimate in that the claims comply with the general provisions of UNCLOS and other aspects of law of the sea. However, a series of fundamental problems undermine China's claims, including the fact that Vietnam, Malaysia, the Philippines, and Taiwan all maintain claims to sovereignty over some or all of the islands in the South China Sea. Since the 1995 Mischief Reef Incident between China and the Philippines there has been a static situation in which each of the claimants occupies some of the features.

China, of course, occupies and administers all of the Paracels, though Vietnam still maintains its claim to sovereignty over them. The Spratlys present a mixed case. Since 1996, Vietnam has occupied or controlled approximately 22 features, China 10 features, the Philippines 8 features, Malaysia 4 features, and Taiwan 1 feature.¹⁰ In order to support a claim of sovereignty over an island, international law requires that a coastal state must demonstrate effective occupation or continuous administration and control.¹¹ On this basis, China's claim to those of the Spratly Islands that it does not occupy or effectively administer and control is unsupported by international law. The same is true of the claims of any other parties that do not actually occupy a feature over which they claim

Hawaii and the Asia Pacific Center for Strategic Studies, Honolulu, October 1, 2010.

¹⁰ Mark J. Valencia, Jon M. Van Dyke, and Noel A. Ludwig, *Sharing the Resources of the South China Sea*, University of Hawaii Press (Honolulu: 1999), plate 1. Note that statements on occupation and control over various of the Spratlys features vary, for instance, see Rowan, "The U.S.-Japan Security Alliance, ASEAN, and the South China Sea Dispute," n. 1 above, for a somewhat different count.

¹¹ *Arbitral Award of His Majesty the King of Italy on the Subject of the Difference Relative to the Sovereignty over Clipperton Island (France v. Mexico)*, January 28, 1931, *American Journal of International Law*, Vol. 26, (1932), p. 390; *Arbitral Award Rendered in Conformity with the Special Agreement Concluded on January 23, 1925, Between the United States of America and the Netherlands Relating to the Arbitration of Differences Respecting Sovereignty over the Island of Palmas (Miangas)*, April 4, 1928, in *American Journal of International Law*, Vol. 22 (1928), p. 867; *The Minquiers and Ecrehos Case (France/United Kingdom)*, 1953 *International Court of Justice* 47; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening)*, 1992 *International Court of Justice* 351.

sovereignty. Some observers wrongly conclude that the non-Chinese claims are based solely on European claims from the colonial era. In fact, the claims of Southeast Asian states are at least in part an expression of the contacts all coastal peoples had with the South China Sea's islands and waters for many centuries and the national consciousness that international law should protect those interests.

Security Interests. Finally, a fourth Chinese perspective is that the U-shaped line reflects China's longstanding maritime security interests in the South China Sea and that these security interests should have legal protection. The Chinese have long viewed the Bohai Gulf, the Yellow Sea, the East China Sea, and the South China Sea—the so-called 'near seas'—as regions of core geostrategic interest and part of a great defensive perimeter established on land and at sea to protect China's major population and economic centers along the coasts. As one PLA Major General recently put it, the South China Sea comprises part of China's maritime "strategic stability belt."¹²

China's assertiveness about its claims in the waters of its 'near seas' has grown in tandem with the size of its navy and maritime services, and from these forces. As one Chinese analyst put it, "The Navy is just one of the means of protecting our maritime rights and interests ... the primary means should be to rely on the law, on international law and internal legislation." To enforce these laws and our sovereign interests at sea, "in recent years we have started to carry out periodic patrols to safeguard our rights in the East and South China Seas."¹³ Thus, some Chinese see international law in conjunction with their developing maritime power as a means to establish the long-desired maritime security buffer throughout the 'near seas,' including the South China Sea. That international law does not provide protection for a coastal state's security interests beyond

¹² "Major General: 'South China Sea is China's Core Interest' is Not an Official Policy," *China Review News*, October 12, 2010, <http://www.chinareviewnews.com>.

¹³ "China's Maritime Rights and Navy," *Shijie Zhishi* (World Knowledge), Beijing, January 1, 2009 (OSC CPP20090123587001).

the narrow territorial sea has not deterred Chinese proponents from seeking to change those norms.

Jurisdiction. A second category of disputes involves the delimitation of jurisdictional boundaries between neighboring sea zones, including exclusive economic zones (EEZ) and continental shelves. China complicates these disputes through its ambiguous claims of authority over the water space within a nine-dashed line, but it is clear that the claim encompasses aspects of jurisdiction as well as aspects of sovereignty.¹⁴ Jurisdiction under international law is something less than full sovereignty in that it does not include the same degree of absolute and exclusive authority to govern all matters of interest to the state. Like sovereignty, jurisdiction is a reflection of *state power* within *specified boundaries*, but the concept of jurisdiction connotes the application of state authority only over *a limited, specified set of subject matters*. All of the disputants involved in the question of sovereignty are also involved in the jurisdictional disputes, plus Indonesia, which has an EEZ claim extending from Natuna Island that overlaps with China's nine-dashed line.¹⁵

The two main sources of jurisdictional disputes in the South China Sea are the boundaries of the various national EEZ and continental shelf zones over which each state may exercise its authority. Within the geographic limits outlined in Article 76 (specified boundaries), coastal states are afforded exclusive authority (state power) to regulate the

¹⁴ Mark J. Valencia, Jon M. Van Dyke, and Noel A. Ludwig, *Sharing the Resources of the South China Sea*, University of Hawaii Press (Honolulu: 1999), p. 77. The authors note that “China seems to have developed a three noes policy to deal with the Spratlys issue—no specification of claims, no multilateral negotiations, and no internationalization of the issue, including no involvement of outside powers.” China’s policy seems to remain unchanged over the past 11 years.

¹⁵ For a recent version of China’s nine-dashed line claim, see Letter from the Permanent Mission of the People’s republic of China to the United Nations to H. E. Mr. Ban Ki-Moon, New York, May 7, 2009 (CML/18/2009), available at

http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf

exploration and exploitation of the resources of the seabed, although the legal character of the water space above the continental shelf remains unchanged (a limited, specified set of subject matters). Thus, international law provides for limited coastal state jurisdiction within a specified zone known as the continental shelf.

Similarly, one of the key innovations of UNCLOS was that it specified coastal state authority in the water space beyond the territorial sea, a concept that had been steadily developing over the course of the 20th century. UNCLOS Part V established coastal state jurisdiction over a vast littoral swath of water space known as the EEZ, which may extend to 200 nautical miles from the coastal state's baselines (specified boundaries), in which the coastal state has "sovereign rights" to the resources plus related jurisdictional authorities (exclusive state power), for the purpose of managing those resources and (a limited, specified set of subject matters). Thus, UNCLOS completed the creation of jurisdictional regimes over resources in littoral waters. Accordingly, this second category of disputes is at its core disagreement over jurisdictional authority in the South China Sea to explore and exploit the resources on and under the Sea's continental shelf and in its water column.

China's Ambiguous Jurisdictional Claims. All states with a coastline that borders the South China Sea claim a continental shelf and an EEZ, however very little actual delimitation of the boundaries between coastal state zones has occurred.¹⁶ China's nine-dashed line claim in particular presents a major problem for resolving these disputes because in addition to relying on the line as a source of sovereignty, Chinese policymakers also refer to it as the basis for China's South China Sea jurisdictional claims. As noted above, some Chinese scholars and policymakers assert that the concept of historic rights (as an alternative to, or in addition to, China's claim to historic waters in the South China Sea) applies as a basis for Chinese jurisdictional control over water space within the nine-

¹⁶ *Table of Claims to Maritime Jurisdiction (as of July 31, 2010)*,

http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/table_summary_of_claims.pdf.

For Taiwan's claim, see *CIA World Fact Book, Maritime Claims*, at

<https://www.cia.gov/library/publications/the-world-factbook/fields/2106.html>.

dashed line. The concept of historic waters has only the briefest mention in UNCLOS, but exists in customary international law related to bays. It allows coastal states to claim extended jurisdiction over water space or islands when the coastal state's claim has been open and long-standing, exclusive, and widely accepted by other states.

China's claim to a historic right to jurisdiction over the waters of South China Sea is seriously undermined by similar, overlapping claims maintained by the Philippines, Vietnam, Malaysia, Brunei and Indonesia, not to mention parallel claims made separately by Taiwan. This demonstrates that however long-standing China's claims of jurisdiction in the South China Sea might be, clearly they are not exclusive or widely accepted by other states. Nonetheless, Chinese law asserts historic rights as a basis for jurisdiction over the South China Sea. The 1998 Law of the People's Republic of China on the Exclusive Economic Zone and Continental Shelf claims an exclusive economic zone emanating from all Chinese territory, which would logically include all relevant Chinese territory as specified in the 1992 Territorial Sea Law, which, as noted above, specifically includes each of the island groups in the South China Sea. Thus, in combination, these two Chinese laws assert an EEZ and therefore jurisdictional control over nearly the entire South China Sea area within the U-shaped line.

In addition to its ambiguity and lack of specificity, there are many problems with China's approach to jurisdiction in the South China Sea. For instance, only a very few of the South China Sea's islands qualify under UNCLOS for more than the mere twelve nautical mile territorial sea. Another weakness of China's claim of jurisdiction over the South China Sea based on its assertion of sovereignty over the sea's rocks and sandbars is that China has objected to similar claims made by Japan to an exclusive economic zone and continental shelf rights around Okinotorishima, a small coral feature in the Pacific Ocean about 1,050 nautical miles south of Tokyo.¹⁷ International law prevents a state from claiming legal rights if it objects to the same type of claims by other states. As such,

¹⁷ "China Dismisses Japan's Claim of Tiny Atoll in Pacific, *Xinhua (online)*," January 19, 2010.

neither the provisions of UNCLOS nor historic rights are especially persuasive sources of law on which China can base its claims.

Jurisdictional Claims by Other States. In stark contrast to China's, the jurisdictional claims of Vietnam and Malaysia conform much more closely to international law. Vietnam, for instance, claims an exclusive economic zone that "is adjacent to the Vietnamese territorial sea and forms with it a 200-nautical-mile zone from the baseline used to measure the breadth of Viet Nam's territorial sea."¹⁸ In addition to clarity about the boundaries of its claim, Vietnam also specifies the extent of its national jurisdiction.¹⁹ Vietnam's jurisdictional claims track nearly word-for-word with the requirements of UNCLOS articles 57 and 56 respectively, although it should be noted that Vietnam's baselines are considered to be excessive.²⁰

Malaysia's Exclusive Economic Zone Act 1984 make similarly normative EEZ and continental shelf claims.²¹ Additionally, the Joint Submission of Malaysia and Vietnam to the Commission on the Limits of the Continental Shelf makes a reasonable claim to an extended continental shelf beyond the 200-nautical-mile EEZ in accordance with

¹⁸ *Statement on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf of 12 May 1977*, available at:

http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/VNM_1977_Statement.pdf.

¹⁹ *Statement on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf of 12 May 1977*, available at:

http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/VNM_1977_Statement.pdf.

²⁰ *Limits in the Sea, No. 99, Straight Baselines: Vietnam*, United States Department of State, Bureau of Intelligence and Research, December 12, 1983, available at:

<http://www.state.gov/documents/organization/58573.pdf>.

²¹ *Exclusive Economic Zone Act, 1984, Act No. 311 An Act pertaining to the exclusive economic zone and certain aspects of the continental shelf of Malaysia and to provide for the regulations of activities in the zone and on the continental shelf and for matters connected therewith*, available at

http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/MYS_1984_Act.pdf.

UNCLOS article 76.²² The submission uses each coastal state's baselines as the starting point and measures 200 nautical miles without regard to any island features. Concerning the Spratly Islands, the legal approach taken by Vietnam and Malaysia, in contrast with the various Chinese approaches, complies with UNCLOS article 121 concerning the regime of islands and with recent case law. Specifically, the Malaysia-Vietnam approach recognizes that the various islets, reefs and shoals in the southern part of the South China Sea are too small to form the basis of a claim to an EEZ or a continental shelf (or any other form of jurisdiction other than a territorial sea) of their own right.

Another important aspect of Malaysia and Vietnam's claims is that they are specific and public. They represent a choice made by each government concerning how international law should be interpreted in regard to their jurisdiction over offshore zones. They provide a basis for discussion, negotiation, and even potentially litigation by other states that may have different perspectives. They do not rely on power—military or economic—to decide the issue. In these ways, the Malaysia-Vietnam approaches provide a basis for a stable resolution to any disputes, which is the point of comment by the International Court of Justice in the *Fisheries Case* discussed above.

The government of the Philippines established archipelagic baselines for its main islands in legislation completed in 2009 and filed on deposit with the UN.²³ This legislation also claims a separate, non-specific regime of islands for its claims among the Spratly Islands, known as Kalayaan Islands, and its claim to the Scarborough Shoals. The

²² Malaysia-Socialist Republic of Vietnam, *Joint Submission to the Commission on the Limits of the Continental Shelf Pursuant to Article 76, paragraph 8 of the United Nations Convention on the Law of the Sea 1982 in respect of the southern part of the South China Sea*, Executive Summary, May 2009, available at

http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/mys_vnm2009excitivesummary.pdf.

²³ *Republic of the Philippines Public Act No. 9522*, available at:

http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/phl_2008_act9522.pdf.

Philippines also maintains an EEZ claim based on a 1978 Presidential Proclamation.²⁴ The Philippines EEZ extends 200 nautical miles from its baselines, which were publicly established by the 2009 legislation. Thus, with regard to its main islands, the Philippines made a specific and public claim concerning the extent of its EEZ.

Concerning its continental shelf claim, the Philippines retains on file with the UN its Presidential Proclamation of 1968, which claims a continental shelf “to where the depth of the [Philippines] superjacent waters admits of the exploitation of such resources, including living organisms belonging to sedentary species.”²⁵ This outdated expression of the jurisdictional limits of the Philippines continental shelf claim stems from the definition that appeared in the 1958 Continental Shelf Convention, the provisions of which were updated by UNCLOS article 76.²⁶ Additionally, the Philippines made a claim to an extended continental shelf in the Philippines Sea, but not in the South China Sea. The Philippines could improve the clarity of its jurisdictional claims to a continental shelf by bringing its proclamation into alignment with UNCLOS. Additionally, the government of the Philippines should publicly state what, if any, claims to jurisdiction over maritime zones it maintains, based on its claim of sovereignty over some of the Spratly Islands and Scarborough Reef. These steps would promote stability by removing sources of ambiguity and allowing for negotiations or arbitration in concert with international law.

²⁴ *Presidential Decree No. 1599 of 11 June 1978 establishing an Exclusive Economic Zone and for other purposes*, available at:

http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PHL_1978_Decree.pdf.

²⁵ *Presidential Proclamation No. 370 of 20 March 1968 Declaring as Subject to the Jurisdiction and Control of the Republic of the Philippines all Mineral and other Natural Resources in the Continental Shelf*, available at:

http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PHL_1968_Proclamation.pdf.

²⁶ *Convention on the Continental Shelf*, Geneva, April 29, 1958, available at:

http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_1_1958_continental_shelf.pdf.

In sum, the jurisdictional claims of Malaysia and Vietnam are fully public and stated with specificity. The claims of the Philippines are improving in clarity, but there continues to be room for improvement in that regard. The claims of Brunei should be made more publicly accessible by placing them on deposit with the UN. The jurisdictional claims of China in the South China Sea, however, remain ambiguous and non-public and therefore contribute to regional instability and present problems for all states whose vessels navigate the sea lanes of the South China Sea.

Control. The third category of disputes relates to control over the water space itself, and is fundamentally about the correct interpretation of international law concerning the balance of coastal state and international rights and obligations in the EEZ and other coastal state waters. This dispute primarily involves only China and the United States, but many other countries around the globe have an interest and a stake in its outcome since they involve China's attempts to alter international norms concerning freedom of navigation for military purposes and to roll back the balance of coastal state and international rights in coastal zones that were negotiated in the development of the provisions of UNCLOS. This resulted in a series of confrontations between American and Chinese government vessels in the South China Sea between 2001 and 2009 that, although tension-producing, were manageable from a political and military perspective. China ended this mutual policy of 'managed friction' however on March 8, 2009 when it confronted the USNS *Impeccable* (T-AGOS 23) with five vessels—a PLA Navy intelligence ship, a government fisheries patrol vessel, a Maritime Surveillance Service Vessel of the State Oceanographic Administration, and two small fishing trawlers²⁷

Under the observation of all three Chinese government vessels, the fishing trawlers maneuvered dangerously to a within 8 meters ahead of *Impeccable* and then abruptly stopped. This forced *Impeccable* to take emergency action to avoid a collision.

²⁷ Captain Raul Pedrozo, U.S. Navy, "Close Encounters at Sea: The USNS *Impeccable* Incident, *Naval War College Review*, Vol. 62. No. 3, Summer 2009, p. 101.

Additionally, the Chinese aboard the fishing trawlers used a grappling hook to try to snag the Impeccable's towed cable.²⁸ These Chinese actions violated international norms related to the duty to exercise due regard in navigation of vessels at sea and also constituted unlawful interference with the sovereign vessel of another state. The Impeccable left the scene in order to reduce immediate tensions, but returned to the exact location several days later in the company of an American warship, the USS *Chung Hoon* (DDG).²⁹ Thus, the Chinese escalation from past patterns raised the dispute over navigation issues from 'managed friction' to 'near conflict,' thereby initiating renewed American strategic attention to the waters of the South China Sea and to the international norms governing freedom of navigation for military purposes in the EEZ.

The creation of the exclusive economic zone in 1982 by UNCLOS as a region extending beyond the territorial sea to a maximum of 200 nautical miles from a coastal state's shores was a carefully balanced compromise between the interests of coastal states in managing and protecting ocean resources and of maritime user states in ensuring high seas freedoms of navigation and over-flight, including for military purposes. Thus, while in the exclusive economic zone the coastal state was granted sovereign rights to the resources and jurisdiction to make laws related to those resources, to ensure the participation of maritime powers high seas freedoms of navigation were specifically preserved for all states.

Nonetheless, China has persistently attempted to shift this carefully balanced compromise by making more expansive claims of legal protection for its security interests, especially in the South China Sea. For instance, one statement by a Chinese military spokesman concerning international freedoms of navigation in the South China Sea is

²⁸ Mark MacDonald, "U.S. Navy Provoked South China Sea Incident, China Says," *New York Times*, March 10, 2009, available at: <http://www.nytimes.com/2009/03/10/world/asia/10iht-navy.4.20740316.html>.

²⁹ Ann Scott Tyson, "Destroyer to Protect Ship Near China," *Washington Post*, March 13, 2009, available at: <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/12/AR2009031203264.html>.

typical. Chinese Defense Ministry Spokesman, Senior Colonel Geng Yansheng, stated “We will, in accordance with the demands of international law, respect the freedom of the *passage* of ships or aircraft from relevant countries which are in compliance with international law.”³⁰ When pressed to explain the distinction between ‘passage’ and ‘navigation’, other senior Chinese officials have stated that the Chinese government has not objected to U.S. Navy vessels that pass through the Chinese EEZ en route to another destination. However, when such vessels conduct exercises, gather intelligence or other militarily useful data, or undertake activities other than mere passage, these officials argue that the vessels are in violation of international law and Chinese domestic law.

U.S. Secretary of State Hilary Clinton, however, made clear at the ASEAN regional Forum in July 2010 that in the South China Sea, the United States will not accept China’s limitations on freedoms of navigation for military purposes. She stated that the U.S., like all states, has “a national interest in freedom of navigation, open access to Asia’s maritime commons, and respect for international law in the South China Sea.”³¹

Three Objectives.

China is pursuing three main objectives in the South China Sea and Southeast Asia, regional integration, resource development, and enhanced security. Chinese actions over the past four decades are better understood in relation to its alternative strategies for achieving these objectives.

Regional Integration.³² Regional integration between China and the states of Southeast Asia is a priority for China as part of its overall policy of Peaceful Rise.

³⁰ Ben Blanchard, “China Says Will Respect South Seas Navigation Freedom,” Reuters, July 31, 2010, available at: <http://www.abs-cbnnews.com/global-filipino/world/07/30/10/china-says-will-respect-south-seas-navigation-freedom>.

³¹ Donald K. Emmerson, PacNet #45, *China’s ‘Frown Diplomacy’ in Southeast Asia*, Pacific Forum CSIS, October 6, 2010, available at: <http://csis.org/files/publication/pac1045.pdf>.

³² I am indebted to my colleague, Nan Li, for much of the information in this section.

Regional integration with other South China Sea states, therefore, has both political and economic aspects. To achieve growth, it is helpful for a state to have peaceful borders so that resources can be channeled into economic development rather than armies and border defense systems.³³ Accordingly, in order to focus domestic energy on its rapid economic rise, China entered into a period of strategic pause concerning physical confrontation over the Spratly Islands beginning in the mid-1990s and after the political setbacks China suffered after the Mischief Reef Incident. This new strategy, pursued from the late 1990's until March 2009, resulted in some major progress for China in that opportunities for regional political and economic integration with China were largely welcomed by Southeast Asian states because they promoted region-wide economic growth and a served to counter-balance other outside powers, such as the United States.

In order to facilitate the political aspects of regional integration, China undertook numerous political relationships with ASEAN. Perhaps the most successful aspects of China's pursuit of regional integration, however, were the programs of economic, commercial, and infrastructure development. Two-way trade, for instance, soared over the past two decades from less than \$8 billion in 1991 to \$106 billion in 2004 and to \$231 billion in 2008. This last figure is higher than the trade between ASEAN-states and the U.S. for the same year, which amounted to \$172 billion. For many years, ASEAN enjoyed a trade surplus with China, which has slipped in recent years. To compensate, China agreed to increase its bilateral investment in the region by 60% over two years.

Additionally, China supported major infrastructure projects in the region. One such project, the Nanning-Singapore economic corridor, focuses on the construction of an integrated railway transportation system that links Nanning, Hanoi, Ho Chi Minh City, Phnom Penh, Bangkok, Kuala Lumpur, and Singapore. A second project, the Greater Mekong Sub-region similarly links Kunming in China's Yunnan Province with Singapore

³³ M. Taylor Fravel, *Strong Borders, Secure Nation: Cooperation and Conflict in China's Territorial Disputes*, Princeton University Press (2008).

via high-speed rail. More difficult for China to achieve is its regional integration initiative that focuses on Pan Beibu Gulf development and the Hainan Initiative. These initiatives have the obvious challenge of dealing with areas in which sovereignty and jurisdiction remain in dispute.

Some commentators suggest that China's many initiatives in support of regional integration have at their core a "ripe fruit" strategy in which time is on China's side. According to this line of thinking, regional integration efforts were designed to freeze the disputes and create favorable regional political conditions while China increased its economic and military power. Once a high level of comparative development is achieved,

If...[China] continues to press its expansive claims in the South China Sea aggressively, the islands and their attendant maritime space may simply fall into its hands like ripe fruit. At the least, [China] will dominate the issue and obtain the lion's share of any settlement.³⁴

Some Chinese believe that the aims of China's substantial investment in Southeast Asia and its policy of freezing the disputes were to earn gratitude, or perhaps leverage, that would result in willing abandonment of South China Sea claims by other states in China's favor. Recent events, however, suggest that Southeast Asian states prefer that no major power gain too much influence in the region, including China. Thus, in an opposite pendulum swing from the one in the 1990s that led ASEAN states to welcome greater Chinese regional involvement, to offset China's present rising regional influence, Southeast Asian states welcome the attention of outside powers, including the United States, in part to ensure that negotiations over South China Sea disputes proceed on a reasonably equal footing.

³⁴ Mark J. Valencia, Jon M. Van Dyke, and Noel A. Ludwig, *Sharing the Resources of the South China Sea*, University of Hawaii Press (Honolulu: 1999), p. 87.

Resource control.³⁵ In addition to regional integration, China is also pursuing the objective of enhancing its long-term resource security by ensuring its control over most of the South China Sea's living and non-living resources. As one Chinese commentator stated, "What is the major challenge now confronting our nation? It is the question of resources."³⁶ And CNOOC Vice President Zhou Shouwei has stated, "Offshore and especially deep-water oil and gas discoveries have great significance for replenishing China's and the world's oil resources."³⁷

Fishing resources are also important to the Chinese leadership. One government publication states:

The ...Sino-Vietnamese Northern Gulf Fishing Agreement has dramatically compressed the working space for our nation's fishermen. These new difficulties for our hard-pressed fleets undoubtedly constitute one disaster after another. Not only have [such agreements] worsened the situation, but there is also the possibility that it could touch off social instability in various coastal towns and villages.³⁸

Indeed, the Chinese Navy sees the importance of sea power as an aspect of this resource security.

In the new century, the oceans are ... strategic treasure troves of natural resources for the sustainable development of humankind. Humankind's full exploitation and utilization of the oceans and joint management of the oceans in keeping with the law is essentially a redistribution of the world's maritime rights and interests. Whoever has the greatest investment in the oceans, whoever has the greatest capacity for exploiting the oceans, and whoever

³⁵ I am indebted to my colleague Lyle Goldstein for much of the information in this section.

³⁶ Zhang Wenmu, *China Report*, August 2009, p.28, (CMSI Translation).

³⁷ Comments posted on the company's web site, June 10, 2010.

³⁸ Fisheries Management: Focusing on a Rights-Based Regime, 2006.

controls the oceans will have the upper hand and will acquire more wealth from the oceans, and that nation will be rich and powerful. Therefore it is inevitable that the oceans will become an important arena for international political, economic, and military struggles as well as an important objective in the struggle of every nation for rights and interests.³⁹

Perhaps this author's primary intention was to justify expansion of China's navy. However, that he chose to do so using arguments about resource insecurity and the importance of national control over maritime resources is indication of the author's awareness of anxiety among the Chinese people and leadership over the prospect of providing food and energy for more than 1.3 billion people, especially as expectations rise along with China's economic status. Thus, an important objective for China is to ensure its future access to the resources of the South China Sea.

Enhanced Security. China's third objective appears to be to enhance its control over the South China Sea in order to create a maritime security buffer zone that protects the major population centers, industry, and rich cultural sites of China's developed eastern coastal area.

As one retired PLA Major General stated,

China's sea area is the initial strategic barrier for homeland security. The coastal area was the front line of growth during China's economic development and the development of Chinese civil society. China's most-developed regions are along the coastline... The coastal area also possesses the largest population of any of the country's regions, the highest concentration of high-technology industries, and the most modernized culture. If coastal defense were to fall into danger, China's politically and economically important central

³⁹ "Fifth Stroll Around the World Expo—A Blue Water Navy: Imaginings in the World Expo Garden, *Dangdai Haijun*, August 1, 2010, p.28. (OSC TranslationCPP20100928090014).

regions would be exposed to external threats. In the context of modern warfare, military skills such as long-range precision strike develop gradually, which makes the coastal sea area more and more meaningful for homeland defense as a region providing strategic depth and precious early-warning time. In short, the coastal area is the gateway for China's entire national security.⁴⁰

The idea that China needs to control its littoral maritime zones is based on the classic approach to geostrategy of a country with security concerns from both the land and the sea. Such countries generally follow a security strategy that balances land and maritime strength in order to develop concentric circles of strategic control, influence, and reach around its central region of vital national interest.⁴¹ Thus, the South China Sea, East China Sea and Yellow Sea—the so-called ‘near seas’—represent an area in which Chinese strategists believe they need to develop military control in order to exclude external threats and thereby to raise the level of security for China's coastal region.

However, China's recent actions to enhance its security by competing with other claimants for sovereignty, jurisdiction and control over the South China Sea fail to account for the interests of other states. Thus, beginning in March 2009, when China shifted its regional strategy away from integration and resource cooperation toward competition over sovereignty and security concerns, rather than harvesting the political benefits gained from more than a decade of cooperation it allowed its ‘ripened fruit’ to rot on the vine. Chinese policy makers would do well to remember that regional integration, resource control, and enhanced security are the shared objectives of all regional states and that in the past cooperation has produced substantial results that the recent turn to competition is unlikely

⁴⁰ Peng Guangqian, “China's Maritime Rights and Interests,” in Dutton, Peter (ed.) *Military Activities in the EEZ: A U.S.-China Dialogue on Security and International Law in the Maritime Commons*, China Maritime Studies #7, Naval War College Press, Newport (2010, forthcoming).

⁴¹ H.J. MacKinder, “The Geographical Pivot of History,” *The Geographical Journal*, Vol. XXIII, No. 4, (1904).

to duplicate. Thus, win-win solutions that focus on *mutual interests* are more promising than win-lose solutions based on *competition for* sovereignty, jurisdiction, and control.

New Tianxia Thinking

It is striking the degree to which the South China Sea interests of China and its Southeast Asian neighbors overlap. Regional political and economic integration has greatly benefited each. Each has an interest in sustainable development of the South China Sea's rich fisheries and other living resources. Each has a growing economy and a similarly growing demand for hydrocarbons to support it. Each has an interest in national security that depends in part on the security of the waters off its shores. What is also striking, however, is that one of the primary reasons for the failure to enhance these interests by resolve the disputes is that the chosen mechanisms for resolution are all win-lose: that is, sovereignty and jurisdiction as mechanisms for securing national interests in the South China Sea are win-lose solutions.

Because the islands and reefs of the South China Sea were for many centuries open to fishermen and traders of all coastal peoples—Vietnamese, Chinese, Malay, and Filipinos alike—each nation developed a connection to and an interest in these islands. Similarly, for many centuries the rich fishing grounds were open to all to fish for food without fear of exclusion or dominance by others. Even if as China claims it exercised authority over the islands and waters during this period, it was a sovereignty based on *tianxia* (天下)—the Emperor's mandate over everything under heaven. One aspect of *tianxia* that is worth reviving is sovereignty exercised with the most gentle of touches and for the mutual benefit of all in Southeast Asia. The Emperors knew what modern Chinese leaders seem to have forgotten: that when the powerful are generous, their power is respected; when the powerful take for themselves, their power is feared. Thus, a return to policies that accommodate mutual interests will be much more successful than the win-lose approaches pursued by the parties today.

To move forward productively, what is needed is a regional turn to *tianxia* thinking⁴² updated for the twenty-first century, in which solutions to the Three Disputes are found in win-win, interests-based approaches that accommodate all and exclude none.⁴³ A good place to begin discussing and addressing these mutual interests is through a South China Sea Code of Conduct in which all parties agree on peaceful approaches to resolve the many disputes that currently threaten regional tranquility.

New *Tianxia* Thinking about Sovereignty.

China's muscular insistence in the years between 1975 and 1995 on severing the sovereignty interests of other countries to the Paracel and Spratly Islands only resulted in a coalescence of political and military opinion in Southeast Asian states against China. Even China's policies of the past fifteen years that focused on gaining political and economic leverage, rather than military leverage, have failed because they remained focused on obtaining exclusive Chinese domination of territories that China has never in its history fully controlled and in which all other peoples in the region were traditionally able to operate. The policy failed because it would have severed the interests of other states in the region to use the physical territory of the Spratly Islands to pursue commercial interests, research, enhanced regional and national security, and recreation. This suggests that past proposals for shared regional 'ownership' of the islands should be reconsidered.

One such proposal was originally made by Mark Valencia, John Van Dyke, and Noel Ludwig to establish a form of 'regional sovereignty' over the islands themselves—that is to say, shared authority over the islands among regional states to the exclusion of all others.⁴⁴ A regional authority established by agreement among the claimants could

⁴² I am indebted to Professor Alan Carlson of Cornell University for this particularly apt turn of phrase.

⁴³ Ma Xiaotian Speaks at Xinagshan Forum, China Review News (on line), October 22, 2010, available at www.chinareviewnews.com.

⁴⁴ Mark J. Valencia, Jon M. Van Dyke, and Noel A. Ludwig, *Sharing the Resources of the South China Sea*, University of Hawaii Press (Honolulu: 1999), Chapter VIII.

exercise this authority over the islands, their territorial seas, and sovereign airspace. Representation in the regional authority could take many forms, but should be based on a combination of factors such as national population, length of coastline, and extent of current and historical usage—all of which are factors recognized in international case law as legitimate bases for resolving maritime disputes. This would allow all regional claimant-states to pursue their interests in the physical territory in the South China Sea through a political mechanism designed to efficiently and effectively manage the territory on behalf of them all.

A second example that bears consideration is the status of the island of Svalbard, situated between the north coast of Norway and Greenland. In order to resolve Svalbard's indeterminate status and to avoid international conflict over the island's resources, concerned states attending the Paris Conference in the aftermath of World War I negotiated the Treaty of Spitsbergen of 9 February 1920. The treaty gave primary sovereignty to Norway, but with resource-related rights to all signatories. Original signatories of the treaty include Australia, Canada, Denmark, France, Italy, Japan, Netherlands, Norway, Sweden, the United Kingdom and the United States. The Soviet Union signed in 1924 and Germany in 1925 and currently there are more than 40 signatories, including China.⁴⁵ When the treaty came into force on August 14, 1925, Norway took over sovereignty subject to rights of all parties to fish and hunt, and to “equal liberty of access and entry for any reason, [and] to carry on there without impediment all maritime, industrial, mining and commercial operations on a footing of absolute equality.”⁴⁶ This creative approach to sovereignty, which accommodated the mutual interests of the various parties with the support of the international community, has

⁴⁵ *Treaty between Norway, The United States of America, Denmark, France, Italy, Japan, the Netherlands, Great Britain and Ireland and the British overseas Dominions and Sweden concerning Spitsbergen signed in Paris 9th February 1920*, available at: <http://www.lovdato.no/traktater/index.html>.

⁴⁶ *Treaty between Norway, The United States of America, Denmark, France, Italy, Japan, the Netherlands, Great Britain and Ireland and the British overseas Dominions and Sweden concerning Spitsbergen signed in Paris 9th February 1920*, available at: <http://www.lovdato.no/traktater/index.html>, Article 3.

contributed to regional security by avoiding conflict, effectively managing living and non-living resources, and productively contributed to international scientific research. As such, it should be considered a potential model for a negotiated resolution of the disputes over the Spratly Islands.

New *Tianxia* Thinking about Jurisdiction.

There are many examples of collaborative regimes to share jurisdiction over maritime resources that could be effectively applied in the South China Sea, including many in East and Southeast Asia. The Joint Chinese-Vietnamese fishing zone in the Gulf of Tonkin/Beibu Gulf is one example that draws on an approach to overlapping jurisdictional rights and accommodation of mutual, long-standing interests.⁴⁷ Useful elements of this agreement include delimited zones of national jurisdiction, a cooperative management zone of mutual jurisdiction, and an agreement to cooperative management.⁴⁸

Specifically, the agreement established a Joint Fishery Committee (JFC) that includes representatives from each party. Together they manage common functions, such as fisheries research, consultation with members of the fishing industry, and recommendations concerning catch quotas for the different types of species. The JFC is quite powerful in that it has authority over binding conservation and management measures in order to ensure that fish stocks do not become endangered through over-fishing. Decisions are made on the basis of consensus, which helps to promote willing compliance among state parties. At annual meetings the JFC employs a “quantity control approach” that sets a total allowable catch (TAC) per species for several target species and the number of vessels that may fish them. The total allowable catch is based on the status

⁴⁷ Yu, Yunjun and Yongtong Mu, “The new institutional arrangements for fisheries management in Beibu Gulf,” *Marine Policy*, Volume 30, Issue 3, May 2006, pp. 249-260.

⁴⁸ Thao, Nguyen Hong, “Maritime Delimitation and Fishery Cooperation in the Tonkin Gulf,” *Ocean Development & International Law*, Vol. 36, (2005) pp. 25-44,

of each species, the extent of traditional fishing activities, the impact of modern fishing methods, and the impact of management techniques.⁴⁹

One multilateral entity that could potentially serve as a model for the South China Sea is the Northwest Atlantic Fisheries Organization (NAFO). NAFO manages the high seas fisheries in a rich fishing ground outside the EEZ of any coastal state in the northwest portion of the Atlantic Ocean. NAFO's "objective is to contribute through consultation and cooperation to the optimum utilization, rational management and conservation of the fishery resources of the Convention Area."⁵⁰ The Convention establishes a Fisheries Commission whose purpose is to achieve "optimum utilization of the fishery resources" and to adopt a total annual catch quota based on the recommendations of Scientific Council. The total annual catch quota, by species, is then allocated by the Commission among the members, giving special consideration to traditional fishing patterns and coastal communities whose livelihood is based on resources from fishing regional waters.

The Commission is also responsible for the adoption of "international methods of control and enforcement" by which member states may engage in mutual enforcement of quotas.⁵¹ Mutual enforcement measures include 1) a mandatory vessel monitoring system that uses satellite tracking to provide position updates every to hours, 2) a mandatory observer program in which every vessel fishing in the regulatory area is required to carry an independent and impartial observer on board to monitor all aspects of fishing activities and report any infringements, and 3) and a joint inspection and surveillance scheme in which contracting parties have rotating "inspection presence" (currently Canada and the European Union) to monitor rules compliance by the vessels of all contracting parties and

⁴⁹ David Rosenberg, "Managing the Resources of the China Seas: ☐China's Bilateral Fisheries Agreements with Japan, South Korea, and Vietnam," *The Asia-Pacific Journal: Japan Focus* (online), available at <http://www.japanfocus.org/-David-Rosenberg/1789>.

⁵⁰ Information about the Northwest Atlantic Fisheries Organization is available at <http://www.nafo.int/about/frames/about.html>.

⁵¹ *Convention on Future Multilateral Cooperation☐in the Northwest Atlantic Fisheries*, Article XI.

to report apparent infringements to the government of the contracting party to which the vessel belongs for further investigation and administrative or judicial action.⁵² NAFO's well-developed scheme for multilateral accommodation of mutual fisheries interests and mutual enforceability could serve as a win-win model of New Tianxia Thinking for fisheries cooperation in the South China Sea.

New *Tianxia* Thinking about Control.

What happened in Hanoi at this summer's ASEAN Regional Forum? The United States and ASEAN states made it clear to China that its claims are unsustainable under international law, regional political dynamics, and great power politics. Reports were published of rising regional friction over security issues and a desire by regional states to see renewed American attention to Southeast Asian security dynamics. As one Australian defense scholar stated, "All across the board, China is seeing the atmospherics change tremendously. ... The idea of the China threat, thanks to its own efforts, is being revived."⁵³ Amidst this tension, U.S. Secretary of State Hilary Clinton took the opportunity to remind ARF attendees that freedom of navigation for all purposes, including for military activities, is a vital American national interest and is in the interest of *all* states that rely on open and secure sea lanes. Indeed, "*all*" includes China. And it has long puzzled American security analysts that China has pursued a policy toward international law that appears to be based largely on regional objectives and which conflicts with China's larger global interests.

Underlying the concern of other states about China's international law perspectives is the question of what kind of major power will China become as it continues to rise? Will it use its increased power to achieve only its own interests at the expense of the

⁵² *Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries*, Regulations, available at <http://www.nafo.int/fisheries/frames/regulations.html>

⁵³ Edward Wong, "China's Disputes in Asia Buttress Influence of U.S.," *New York Times*, September 23, 2010.

interests of others? If so, this win-lose path is likely to lead to conflict. Or will China undertake a more active leadership role from within the current architecture of norms, institutions, and international law and seek to develop win-win solutions to problems of overlapping interests? Whether the end of the 21st century sees a strong United States, a strong China, or a strong United States *and* a strong China, a regional partnership to address non-traditional security concerns is a win-win approach to accommodating the dynamics of mutual interests among the tensions of international relations.

Conclusion

The Three Disputes in the South China Sea have been sources of instability and even aggression for more than four decades. Only since the negative reaction to the 1995 Mischief Reef Incident and China's shift of policy to focus more on regional integration and joint resource development has there been a period of relative peace. Future peace and security in the South China Sea require all regional countries to remain focused on mutual interests, rather than on the pursuit of national interests alone. This should include a renewed commitment by all regional states to focus on political, economic, and commercial integration and on the joint development of living and non-living maritime resources that form a common Asian heritage. Non-regional states with regional interests, including the United States, can provide meaningful assistance and support in these endeavors.

Achieving a lasting situation of regional stability will require new approaches. The current pursuits of sovereignty, jurisdiction, and control are win-lose approaches that may result in a settlement based on power alone, but such settlements may not be final because they do not account for the long-standing mutual interests of others. Today is an age that calls for all parties to develop new forms of win-win problem solving. Such approaches involve shared authority, rather than exclusive authority, and a focus on mutual interests, rather than nationalist approaches meeting a state's needs. Only this new

form of thinking—this New *Tianxia* Thinking--will insure that the course of 21st century events does not follow the rivalry and conflict that dominated events in the 20th century./.

Author's Biography

Peter Dutton is an Associate Professor of Strategic Studies in the China Maritime Studies Institute at the U.S. Naval War College. His current research focuses on American and Chinese views of sovereignty and international law of the sea and the strategic implications to the United States of Chinese legal and policy choices. Prof. Dutton's most recent publication is an article on China's perspectives on legal rights and interests in the South China Sea entitled "Through a Chinese Lens," (USNI Proceedings, April 2010). Selected additional publications include "Caelum Liberam: Air Defense Identification Zones Outside Sovereign Airspace," (American Journal of International Law, October 2009), "Charting a Course: US-China Cooperation at Sea," (China Security, April 2009), "Scouting, Signaling and Gate-Keeping: Chinese Naval Operations in Japanese Waters and the International Law Implications," (China Maritime Studies Monograph, April 2009), and "Carving Up the East China Sea," (Naval War College Review, Spring 2007). Additionally, Professor Dutton has testified before the U.S. China Economic and Security Review Commission and before the Senate Foreign Relations Committee.